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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 6

ALFRED GRASSIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alfred Grassia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 26, 1965.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is printed in the appendix to this petition (1b).[1] The opin-

[1] References are indicated as follows:
References to the numbered pages of the appendix filed by petitioner in the Court of Appeals together with the proceedings in that court (a).
References to the numbered pages of the appendix to this petition (b).
References to the numbered pages of the record certified by the clerk of the District Court on June 4, 1965 and now on file in this Court (R.). (*footnote continued*)

ions in *U. S. A.* v. *Costello, Marchetti* and *Gjanci,* and *U. S. A.* v. *Piccioli,* related cases, are printed in the appendix filed in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court (#823 App. 1-23a).

Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1965. Petitioner's timely petition for rehearing *en banc* was denied on December 17, 1965 (100a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

Petitioner's conviction stems from the same raid referred to in *Marchetti* v. *U. S. A.,* No. 823 on the docket of this Court, and raises the following questions also presented in that petition:

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955). upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

References to the numbered pages of the supplemental record certified by the clerk of the District Court on July 21, 1965 and now on file in this Court (SR.).

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2. Assuming, *arguendo,* the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgment of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violates his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U. S. C. §§4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the appendix to this petition (6b).

Statement

Petitioner faces a four month prison sentence and a $2,500 fine (72a) for a conviction upon a charge of wilfully failing to pay, in violation of 26 U. S. C. §7203, the special wagering tax imposed by 26 U. S. C. §4411 (1a, 8a-9a, 49a; 2b). The judgment was entered following petitioner's plea of *nolo contendere* to count one of a two-count indictment returned under seal by a grand jury of the District of Connecticut on October 6, 1964 (1a, 6a, 8a, 76a-78a).

Petitioner's conviction stems from a raid on October 8, 1964, in Bridgeport, Connecticut, which also resulted in convictions of others who now seek review in this Court (#823 App. 1-23a).

By motions to dismiss the indictment—all of which were denied by the trial court (5a, 6a, 11a-14a, 45a, 49a)—petitioner challenged the constitutionality of the statutes involved, on their face and as applied to him, and raised all issues presented by this petition. After notifying the District Court and the Government of his intention to appeal the issues raised in the motions to dismiss, petitioner submitted and the court accepted his plea of *nolo contendere* on February 16, 1965 (6a, 79a; 3b).

In addition to the indictment returned against petitioner, the grand jury on October 6, 1964 also returned 37 other indictments which alleged violations of 26 U. S. C. §§7203, 4411 and 4412 (19a). On October 8, 1964, all of the defendants indicted by the grand jury, as well as approximately six other defendants against whom similar charges were filed, were simultaneously arrested in what a Government press release termed a "spectacular thrust at the exyensive (sic) gambling activities in" the Bridgeport, Connecticut area, in which "75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments" (18a).

As noted, when the indictments were returned on October 6, 1964, they were at the Government's request impounded by the court (1a, 21a, 76a-78a). The court specially warned:

> ". . . there must be no disclosure by anyone as to the identity of those named in the indictment, or even of the fact that such proceedings have taken place by you ladies and gentlemen" (78a).

Prior to the time the impounding order was vacated at 2:36 p.m., October 8, 1964 (21a, 22a), the Government sum-

moned members of the press to a private law office in Bridgeport (23a-24a) and later took them to the Internal Revenue Service headquarters, enabling them to photograph those arrested, including petitioner (36a), as they were brought into custody (24a). *The Bridgeport Post* newspaper of October 8, 1964 printed banner headlines (30a) and an extensive article proclaiming the arrests before some defendants were actually arrested (22a, 30a, R. 40-41) and newspapers and radio and television broadcasts were saturated with details of the raids and individuals involved (22a-23a; #823 App. 7a-8a).

At or before the time the representatives of the press were brought to the Internal Revenue Service office (24a, R. 12), the Government handed out a prepared statement marked "FOR IMMEDIATE RELEASE"; "U. S. TREASURY AGENTS STAGE MASSIVE RAIDS" (24a; R. 55-57).

In addition to the prepared release, additional oral statements were made, including these:

"We have definitely broken the back of gambling in the city" (25a, 38a, R. 13, 40, 42).

"The raids were part of the national crackdown on organized crime initiated by the Office of the U. S. Attorney General" (18a, 22a, R. 13).

"The incidence of violation of wagering laws was extensive and prevailed throughout a great part of the City" (25a, R. 13).

"Based on the amount of money found, the Bridgeport gambling operation involved gross receipts of more than $1 million a year" (28a).

"Funds from the gambling operation in Bridgeport were supporting prostitution and shylocking" (26a, 34a, R. 40, 46).

"Gambling is wide open in Bridgeport. There's no hiding the fact. It has been pretty wide open in Bridgeport for a long time" (26a, 34a, R. 49, 46).

"Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship" (27a, 42a, R. 44).

In the wake of the Government's conscious generation of publicity, petitioner sought dismissal of the indictment in his first motion on the grounds that (1) the Government's conduct barred the prosecution by virtue of, *inter alia*, the Tenth Amendment and the federal court's supervisory power over criminal prosecutions and (2) the wagering tax statutory scheme compelled petitioner to be a witness against himself in violation of the Fifth Amendment privilege against self-incrimination (11a-14a, R. 14). Chief District Judge Timbers refused to permit petitioner to present any evidence relating to the conscious generation of publicity (45a, R. 60, SR. 13-73) and denied the motion on all grounds (45a, R. 60).

On January 11, 1965, while petitioner was awaiting trial (5b) Chief District Judge Timbers imposed sentence on the first group of defendants who were arrested in the raid of October 8, 1964, at the time petitioner was arrested. In describing the revenue laws here involved and in announcing his policy for enforcement, Judge Timbers said:

". . . it is the clear intent of Congress in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws . . ." (54a, R. 94-95; #823 App. 345a).

Again, on February 8, 1965, prior to sentencing a second group of defendants arrested on October 8, 1964, Chief Judge Timbers made similar comments (58a-69a) at a session of court to which newsmen had been invited to attend (R. 104). He first criticized the "wrist slapping penalties" imposed by the state courts and then the "ostrich-in-the-sand" attitude of some State officials. Following detailed suggestions on "how to eradicate this disease" (61a), Chief Judge Timbers concluded with this comment:

"In conclusion, the important thing, if we are successfully to come to grips with the cancer of organized gambling in this state, is action: intelligent action, courageous action, swift action, and action now." (67a).

On the basis of these public pronouncements, as well as the earlier widespread publicity by the Government, petitioner moved again to dismiss the indictment. This motion was also denied (80a).

Following the denial of the final motion to dismiss and petitioner's conviction upon his plea of *nolo contendere*, petitioner appealed to the Court of Appeals, which affirmed (1b).

The court below recognized that *Albertson* v. *Subversive Activities Control Board*, —— U.S. —— (1965), may lead to the invalidation of the wagering tax statutes here in-

volved on self-incrimination grounds, but felt that that issue must be determined only by this Court (3b).

In regard to the claim of undue publicity, the court below clearly recognized the impropriety of "publicity generated by the prosecutor and the judge" (5b; #823 App. 8a, 21a), but felt that petitioner's remedy for the wrongs recognized was in "examining the venire . . . on a voir dire." (5b). The court approached the issue of publicity consciously generated by the prosecutor and the district court in terms of demonstrable prejudice (5b) and made only slight reference to its power to supervise the administration of federal criminal law (4b).

Because petitioner felt the affirmation of his conviction sanctioned an administration of justice predicated in large measure on public pronouncement, he sought rehearing *en banc* (88a). The court below denied rehearing on December 17, 1965 (100a), but stayed the issuance of its mandate to permit the filing of this petition (96a).

Reasons for Granting the Writ

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; (2) because the court below has sanctioned the conscious generation of publicity by the Government and statements by the district judge which

sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision.

I.

> "Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U.S. —— (1965), announced subsequent to our Costello opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (3b).

With this comment, the Court of Appeals rejected petitioner's Fifth Amendment contentions. What petitioner urges here is that this Court (1) accept for determination the issue which the Court of Appeals felt was ripe only for this Court's review and (2) recognize that recent decisions of this Court are in patent conflict with *Kahriger* and *Lewis.*

Petitioner's conviction stems from his failure to answer the following and more detailed inquiries contained in Internal Revenue Form 11-C:

> "Are you engaged in the business of accepting wagers on your own account?"
>
> "Do you receive wagers for or on behalf of some other person or persons?" (70a).

The manner in which *Albertson* and *Malloy* v. *Hogan,* 378 U.S. 1, 11 (1964), demonstrate that response to these

questions pursuant to the statutory scheme here involved violates the Fifth Amendment privilege against self-incrimination is set forth in the petition filed in this Court in *Marchetti* v. *U. S. A.* (#823 Pet. 9-13). So that the Court need not be burdened with the repetition of similar material, reference is made to the Marchetti petition in accordance with the rules of this Court. Rule 23(5), Rules of Supreme Court.

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment and, at the very least, the proper standards for the enforcement of federal criminal law.

The Government's sensational comments—such as "we have definitely broken the back of gambling in the City" (25a) and the Chief District Judge's candid reference to the "latest federal crackdown upon gambling and organized crime" (60a)—clearly indicate that the statutes here involved, narrowly upheld in *Kahriger*, have been enforced both prosecutorally and judicially so as to control conduct which the Tenth Amendment left to the states (#823 Pet. 14-15).

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its "supervisory power to formulate and apply proper standards for the enforcement of the criminal law." *Marshall* v. *United States,* 360 U.S. 310, 313 (1959).

In reviewing petitioner's and others' cases, the court below has recognized the impropriety of the public pronouncements of the Government and the Chief District Judge (#823 App. 8a, 20a-23a; 5b). But the court analyzed petitioner's contentions as requiring a showing of demonstrated prejudice (5b) and concluded that petitioner's remedy was "by adhering to his plea of not guilty and examining the venire . . . on a voir dire." (5b).

Review of this approach of the court below is called for because the Court of Appeals has adopted a view (1) which is counter to this Court's position in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963), (2) which will do disservice to the administration of criminal justice and (3) which ignores the subliminal impact of publicity established as a matter of fact in this case and now recognized by this Court.

1. In *Rideau,* this Court abandoned the need for a showing of actual prejudice and discarded the significance of the *voir dire* examination:

> "The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana. Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, *without pausing to examine a particularized transcript of the voir dire examination of the members of the jury,* that due process of law in this case required a trial before a

> jury drawn from a *community* of people who had not seen and heard Rideau's televised 'interview.'" 373 U. S. at 727. (Emphasis added.)

The *Rideau* dissent adds significance. Mr. Justice Clark, noting an abhorrence for officials who "actively . . . cooperate" in generating publicity, stated:

> " . . . if this case arose in a federal court over which we exercise supervisory powers, I would vote to reverse the judgment before us." 373 U. S. at 729.

Here both Government and trial court "actively . . . cooperate[d]" in generating the publicity (5b).

As concerns the Government's conduct, it is significant that the massive banner headlines (30a) were made possible not only by issuing the prepared press release (18a) and summoning newsmen in advance to a private law office (23a-24a) but by manipulating the court's secrecy order in violation of Rule 6(e), F. R. Cr. P. All information necessary to write the story was released to the newspaper involved by 2:10 p.m. October 8, 1964 (21a) whereas the order unsealing the indictment was filed at 2:36 p.m. October 8, 1964 (21a, 10a) and well before all of the defendants involved in the raids had actually been arrested (22a, R. 85-87). While Rule 6(e) permits sealing the indictment to apprehend defendants, it hardly justifies using the device for public relations purposes.

The Government's justification for the procedure it followed on the ground that it simply "insures that matters that may properly be reported are reported promptly and accurately" (#823 App. 89a) seems to confuse a free press

with a managed press. Certainly, the Government's position has been rejected:

> " . . . neither the press nor the public had a right to be contemporaneously informed by the police or prosecution authorities of the details of the evidence being accumulated against Oswald." A CONCISE COMPENDIUM OF THE WARREN COMMISSION REPORT 319-321 (Pop. Lib. Ed. 1964).

As concerns the trial court's conduct, it is significant that Chief District Judge Timbers "invited press representatives" (R. 104) to the court session of February 8, 1965 where he read a prepared statement (58a-69a)[2] in which he noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime" (#823 App. 22a), outlined a detailed program for his proposed Connecticut Conference on Law Enforcement (#823 App. 22a; 64a-67a) and then asked for comments from the public in the court room (68a).

In view of this active generation of publicity by court and Government, the Court of Appeals' present insistence on a *voir dire,* then, does clear violence to *Rideau,* which involved but the minimal standards of due process, not the higher standards adopted under federal supervisory power.

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[2] The comments were widely reported (54a, 56a, R. 94-124) and, of course, had wide impact in the community. In praising the District Court's pronouncements, one clergyman openly criticized attorneys who, while holding public office, defend those like petitioner accused of violating the revenue laws (R. 101). Such community pressure, prompted by the court's comments, does great disservice to the Sixth Amendment right to counsel at a time when bar and bench alike lament the fact that fewer lawyers are willing to accept criminal cases. McCullough, *The Sunset of the Criminal Lawyer,* 50 A. B. A. J. 223 (1964).

2. The lower court's suggested *voir dire* remedy (5b) —besides being incompatible with *Rideau*—would do great disservice to the administration of criminal justice in Connecticut, particularly in view of the Connecticut Chief Judge's "ill-advised" (5b) comments. At such a *voir dire*, the following type of questions would be appropriate:

> "If the Court should instruct you, contrary to statements you have read or heard made by the Chief Judge of the Federal Court in this State, would you disregard the statements of the Chief Judge and follow the instructions the Court should give?"
>
> "If two witnesses tend to give varying testimony and one of the witnesses has been publicly praised by the Chief Judge of this Court, would you treat the witnesses' testimony the same in weighing their credibility or would you consider the public praise or criticism of the Chief Judge in weighing the credibility of the witnesses?"

The first type of question would be necessary because of, *inter alia,* Chief Judge Timbers' statements that "it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely, that of gambling" (#823 App. 22a) and that gambling is a "cancerous disease" which "together with narcotics and prostitution . . . is one of the ugly handmaidens of vice and corruption" (60a), whereas at trial the charge that would have to be given by the trial judge would be:

> "Defendant is not on trial for bookmaking or gambling, which may be an offense under the laws of the State of Connecticut. So you will not consider any evidence as to bookmaking or gambling for any pur-

pose other than determining defendant's liability, if any, for the taxes alleged in the indictment." Mathes, *Jury Instructions and Forms for Federal Criminal Cases,* 27 F. R. D. 39, 184 (1961).

The second type of inquiry would be required because of Chief Judge Timbers' widely circulated praise of the Internal Revenue agents and members of the prosecution (59a), while criticizing individual police officers for appearing as witnesses in behalf of those accused of violating the revenue laws involved here (R. 98, 99).[3]

This type of *voir dire* examination, then—necessary to make any inquiry meaningful in the wake of the Chief Judge's "statements in the prosecutorial area beyond his function," *United States* v. *Piccioli,* —— F. 2d —— (1965) (#823 App. 23a)—would obviously do disservice to the administration of justice over which this Court has supervisory responsibility.

3. Finally, the Court of Appeals' compelling of reliance on a *voir dire* examination ignores the subliminal impact of publicity. Among the matters established—by offer of proof since petitioner's repeated offers of "testimonial, documentary and electronic audio visual evidence" (21a) were rejected (SR. 13-73; #823 App. 33a-75a)[4]—was the

[3] Certainly, if it was proper for justices of the United States Supreme Court to testify on behalf of one accused of perjury relating to national security, Hiss, IN THE COURT OF PUBLIC OPINION 295 (1957), it cannot be considered improper for police officers to give relevant information in open court in any criminal prosecution. Moreover, " . . . it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. . . . " *Blair* v. *United States,* 250 U. S. 273, 281-82 (1919).

facts, based on a qualified expert's valuation of the publicity that a "juror, although in good faith attempting to do so, could not disregard the publicity . . . [and] a juror . . . who had forgotten about [the publicity] . . . would nevertheless be influenced . . . because of the subliminal stimulation of his mind by that publicity." (29a).

What petitioner's record established in this fashion is consistent with this Court's recognition, in such cases as *Marshall* v. *United States, supra,* and *Janko* v. *United States,* 366 U. S. 716 (1961), *sum. rev'g* 281 F. 2d 156 (8 Cir. 1960), of the "subliminal impact on federal juries of even a single newspaper item." Manes, *Irwin* v. *Dowd: Retreat from Reality,* 22 LAW IN TRANSITION 46, 58 (1962).

To be sure, what petitioner seeks here is a dismissal of the indictment, not a new trial, the customary remedy for existence of improper publicity. But to limit petitioner's relief to a continuance or a change of venue after the court has recognized the impropriety of the publicity generated by the Government and the trial court would be to sanction the Government and trial court causing an abandonment of the Sixth Amendment right to go to trial in the "district where the crime shall have been committed" or the Sixth Amendment right to a "speedy trial." Certainly, there can be no sound reason to allow the Government and trial court to force a defendant to abandon other, equally-important rights, just so the Government and court can practice what now has been condemned.

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[4] The transcript of the November 17, 1964 hearing on the first motion to dismiss when this evidence was offered is contained in the certified supplemental record on file in this Court. It is also printed in the appendix to the Marchetti petition.

It follows that—where the publicity is solely the product of an overzealous free press[5] and where the subliminal impact has not been established—the required demonstration of actual prejudice on a *voir dire may* be appropriate. But where Government and court combine to generate publicity for reasons unrelated to the federal public interest or the subliminal impact of the publicity on the jury can be ascertained with reasonable probability, the demonstration of actual prejudice on a *voir dire* examination is unnecessary and the indictment should be dismissed to prevent forfeiture of other, equally-important Sixth Amendment rights.

Conclusion

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

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January 12, 1965.

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[5] To be sure, the responsibility for freedom of the press and the safeguards of the fair administration of justice—both indispensable elements of our constitutional existence—"present," as Mr. Justice Frankfurter noted, "some of the most difficult and delicate problems for adjudication." *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 919 (1950). Because of the active Government role here, however, this Court need not concern itself with such a delicate problem.